Mohamad Izaham bin Mohamed Yatim v Norina bt Zainol Abidin & Ors

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO 21NCVC-14–03 OF 2014
VAZEER ALAM J
13 AUGUST 2015

Civil Procedure — Striking out — Application to strike out action — Whether plaintiff's action frivolous and vexatious — Whether claim for malicious prosecution sustainable — Whether there was concurrence of malice and want of probable cause — Whether eighth defendant lacked jurisdiction to try plaintiff — Whether eighth defendant acted in bad faith in his conduct of trial — Whether statutory judicial immunity would bar action — Whether action abuse of process and thus obviously unsustainable

Tort — Invasion of privacy — Whether invasion of privacy an actionable tort in Malaysia

On 25 June 2009, the first defendant, a deputy public prosecutor ('DPP'), lodged a police report in her individual capacity as a result of the malicious uploading of her photographs onto an obscene internet website. The second defendant was at all material times the investigating officer, who investigated the policed report lodged by the first defendant. In the course of her investigations, the second defendant had conducted a search of the plaintiff's house and seized a thumb drive and hard disk ('the seized articles'). The seized articles were later sent to the third defendant, a police officer attached to the Unit Siasatan Forensik Komputer, who in the course of analysis found the seized articles to contain sexually explicit and obscene videos. The second defendant's investigations and the third defendant's analysis findings became the foundation for the charge under s 5(1) of the Film Censorship Act 2002 ('the Act') against the plaintiff. The fourth defendant was the DPP, who had instituted the charge against the plaintiff, whilst the fifth defendant was the DPP who prosecuted the charge against the plaintiff. The trial was held before the eighth defendant, a first class magistrate, who found the plaintiff guilty of the charge and fined him RM15,000 and in default six months' imprisonment. The plaintiff did not pay the fine and in default was imprisoned. The plaintiff then appealed against the conviction. The High Court allowed the plaintiff's appeal. The plaintiff proceeded to file the present action against the defendants claiming, inter alia, damages for false imprisonment, breach of privacy and malicious prosecution. The defendants' in turn applied to strike out the plaintiff's writ and statement of claim under O 18 r 19 of the ROC 2012.

Held, striking out the plaintiff's claim with costs of RM15,000:

(1) The plaintiff claimed that that the first defendant had made the police report maliciously against him but had failed to provide any particulars thereof. Although the plaintiff contended that invasion of privacy was now recognised in Malaysia as a tort, it was expressly affirmed by the Court of Appeal in the case of *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal* [2010] 5 MLJ 755 that the law did not recognise invasion of privacy as an actionable tort. This court was bound by the doctrine of stare decisis to apply the law as it stands. Thus, on the pleaded facts no actionable tort for invasion of privacy could arise. There was no reasonable cause of action disclosed against the first, second and third defendants and as such no vicarious liability could attach to the ninth defendant, the Government of Malaysia (see paras 11, 20 & 22).

(2) Based on the evidence before him the fourth defendant had given his written consent for the plaintiff to be charged under s 5 of the Act. The fifth defendant then proceeded to conduct the trial. Thus, both the fourth and fifth defendants believed that there was probable and reasonable cause to initiate and continue the prosecution against the plaintiff. It is trite that if there was reasonable and probable cause disclosed, then the plaintiff's claim for malicious prosecution could not be sustained, even if improper motive was shown. In order to succeed on a claim for malicious prosecution, there should be a concurrence of malice and want of probable cause. However, the pleadings and facts as disclosed in the affidavits did not show the concurrence of malice and want of probable cause. As such, this claim against the second, third, fourth, fifth, sixth and seventh defendants for malicious prosecution and vicariously against the ninth defendant was frivolous and an abuse of process. Thus the claim for malicious prosecution was obviously unsustainable and was bound to fail (see paras 39 & 45–47).

(3) The plaintiff's pleadings are devoid of any particulars in respect of his complaint of lack of jurisdiction on the part of the eighth defendant to try the plaintiff for a charge under s 5(1)(a) of the Act. Pursuant to s 44 of the Act the eighth defendant, being a first class magistrate, was fully seized with jurisdiction to try the plaintiff for a charge under s 5(1) of the Act. Further, although the plaintiff made various allegations of bias on the part of the eighth defendant in the conduct of the trial, the pleadings and the affidavit evidence did not disclose any facts showing the eighth defendant acting in bad faith in his conduct of the trial. In any case, the eighth defendant was acting judicially in the discharge of his judicial duty and was thus fully clothed with jurisdiction to try a charge under s 5(1) of the Act. In the circumstances, statutory judicial immunity as provided under s 14 of the Courts of Judicature Act 1964 would bar this action.

The plaintiff's entire claim was thus not only frivolous and vexatious but also an abuse of process and thus obviously unsustainable (see paras 50 & 56–59).

[Bahasa Malaysia summary

Pada 25 Jun 2009, defendan pertama, seorang timbalan pendakwa raya ('TPR'), membuat laporan polis di dalam kapasitinya sebagai individu akibat daripada gambarnya yang dimuatnaik dengan niat jahat ke laman web lucah. Defendan kedua pada masa material adalah pegawai penyiasat, yang menyiasat laporan polis yang dibuat oleh defendan pertama. Sepanjang siasatannya, defendan kedua telah menjalankan carian di rumah plaintif dan merampas *thumb drive* dan cakera keras (barang rampasan). Barang rampasan kemudiannya dihantar ke defendan ketiga, seorang pegawai polis di Unit Siasatan Forensik Komputer, sewaktu membuat analisis mendapati barang rampasan mengandungi video seksual eksplisit dan lucah. Siasatan defendan kedua dan dapatan analisis defendan ketiga menjadi asas untuk pertuduhan di bawah s 5(1) Akta Penapisan Filem 2002 ('Akta') terhadap plaintif. Defendan keempat adalah TPR, yang telah memulakan pertuduhan terhadap plaintif, manakala defendan kelima adalah TPR yang mendakwa pertuduhan terhadap plaintif. Perbicaraan dibicarakan di hadapan defendan kelapan, majistret kelas pertama, yang mendapati plaintif bersalah akan pertuduhan dan mendendanya sebanyak RM15,000 dan sekiranya ingkar enam bulan penjara. Plaintif tidak membayar denda dan telah dipenjarakan kerana ingkar. Plaintif kemudian merayu terhadap sabitan. Mahkamah Tinggi membenarkan rayuan plaintif. Plaintif meneruskan untuk memfailkan tindakan ini terhadap plaintif menuntut, antara lain, ganti rugi untuk penahanan salah.

Diputuskan, membatalkan tuntutan plaintif dengan kos sebanyak RM15,000:

(1) Plaintif mendakwa bahawa defendan pertama telah membuat laporan polis berniat jahat terhadapnya tetapi gagal untuk memberikan apa-apa butiran daripadanya. Walaupun, plaintif menghujahkan bahawa pencerobohan privasi kini diiktiraf di Malaysia sebagai tort, ia adalah jelas disahkan oleh Mahkamah Rayuan dalam kes *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal* [2010] 5 MLJ 755 bahawa undang-undang tidak mengiktiraf pencerobohan privasi sebagai tort yang boleh diambil tindakan. Mahkamah ini terikat dengan doktrin stare decisis untuk mengguna pakai undang-undang seperti yang sedia ada. Oleh itu, atas fakta yang diplidkan tiada tindakan tort untuk pencerobohan privasi boleh timbul. Tiada kausa tindakan munasabah didedahkan terhadap defendan pertama, kedua dan ketiga dan dengan itu tiada liabiliti vikarius boleh disandarkan terhadap defendan kesembilan, Kerajaan Malaysia (lihat perenggan 11, 20 & 22).

(2) Berdasarkan keterangan di hadapannya defendan keempat telah

memberikan kebenaran bertulis kepada plaintif untuk dituduh di bawah s 5 Akta. Defendan kelima kemudian meneruskan untuk menjalankan perbicaraan. Maka, kedua-dua defendan keempat dan kelima percaya bahawa terdapat alasan yang berkemungkinan dan munasabah untuk memulakan dan meneruskan dakwaan terhadap perayu. Adalah nyata jika terdapat pendedahan alasan munasabah dan berkemungkinan, maka dakwaan plaintif untuk dakwaan niat jahat tidak boleh dikekalkan, jika pun motif tidak wajar ditunjukkan. Untuk berjaya dalam satu dakwaan bagi pendakwaan niat jahat, sepatutnya terdapat pada masa yang sama niat jahat dan ketiadaan sebab barangkali. Walau bagaimanapun, pliding dan fakta seperti yang didedahkan dalam afidavit tidak menunjukkan berlaku serentaknya niat jahat dan ketiadaan sebab barangkali. Dengan itu, dakwaan terhadap defendan kedua, ketiga, keempat, kelima, keenam dan ketujuh untuk pendakwaan niat jahat dan secara vikarius terhadap defendan kesembilan adalah remeh dan penyalahgunaan proses. Maka dakwaan untuk pendakwaan niat jahat ternyata tidak dapat dikekalkan dan pasti gagal (lihat perenggan 39 & 45–47).

(3) Pliding plaintif tidak mempunyai apa-apa butiran berkaitan dengan aduannya akan kekurangan bidang kuasa pada pihak defendan kelapan untuk membicarakan plaintif untuk satu pertuduhan di bawah s 5(1) Akta. Berikutan s 44 Akta, defendan kelapan, yang merupakan majistret kelas pertama, memegang penuh bidang kuasa untuk membicarakan plaintif untuk pertuduhan di bawah s 5(1) Akta. Seterusnya, walaupun plaintif membuat pelbagai tuduhan berat sebelah bagi pihak defendan kelapan dalam menjalankan perbicaraan, pliding dan afidavit keterangan tidak mendedahkan apa-apa fakta menunjukkan defendan kelapan bertindak dengan niat jahat dalam menjalankan perbicaraan. Walau bagaimanapun, defendan kelapan telah bertindak secara kehakiman dalam menjalankan tugas kehakimannya dan dengan itu mempunyai bidang kuasa penuh untuk membicarakan pertuduhan di bawah s 5(1) Akta. Dalam keadaan ini, imuniti kehakiman berkanun sebagaimana yang diperuntukkan di bawah s 14 Akta Mahkamah Kehakiman 1964 akan menghalang tindakan ini. Keseluruhan dakwaan plaintif oleh itu bukan sahaja remeh dan menyusahkan tetapi juga satu penyalahgunaan proses dan oleh itu ternyata tidak boleh dikekalkan (lihat perenggan 50 & 56–59).]

Notes

For cases on application to strike out action, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8809–8847.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)

Broxton v McClelland [1995] EMLR 485, CA (refd)
Coudrat v Commissioners of Her Majesty's Revenue and Customs [2005] EWCA Civ 616; [2005] 1 WLR 45, CA (refd)
Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal [2010] 5 MLJ 755; [2010] 7 CLJ 525, CA (folld)
Glinski v McIver [1962] AC 726, HL (refd)
Goldsmith v Sperrings Ltd [1977] 1 WLR 478, CA (refd)
Herniman v Smith [1938] AC 305, HL (refd)
Hicks v Faulkner (1878) 8 QBD 167 (refd)
Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor [2006] 1 MLJ 464, HC (refd)
Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11, CA (refd)
King v Henderson [1898] AC 720, PC (refd)
Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor [2009] MLJU 1331; [2009] 1 LNS 1256, HC (refd)
Lee Ewe Poh v Dr Lim Teik Man & Anor [2011] 1 MLJ 835; [2011] 4 CLJ 397, HC (refd)
M Mohandas Gandhi & Anor v Ambank (M) Berhad & Anor [2014] 1 LNS 1025, HC (refd)
Majory; Ex p The Debtor v FA Dumont Ltd, In re [1955] Ch 600, CA (refd)
Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826; [2009] 6 CLJ 653, CA (refd)
Nelles v Ontario [1989] 2 SCR 170, SC (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155 (folld)
PP v Oie Hee Koi & Associated Appeals [1968] 1 MLJ 148, PC (refd)
Proulx v Quebec (Attorney General) 2001 SCC 66; [2001] 3 SCR 9, SC (refd)
Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (refd)
Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors [2014] 11 MLJ 481, HC (refd)
Tempest v Snowden [1952] 1 KB 130, CA (refd)
Ultra Dimension Sdn Bhd v Kook Wei Kuan [2001] MLJU 751; [2004] 5 CLJ 285, HC (refd)
Willans v Taylor (1829) 6 Bing 183; (1829) 130 ER 1250 (refd)

Legislation referred to

Courts of Judicature Act 1965 s 14
Criminal Procedure Code s 376(3)
Film Censorship Act 2002 ss 5(1), (1)(a), 43, 44
Rules of Court 2012 O 18 rr 19(1), (1)(a), (1)(b), (1)(c), (1)(d)

Devinder Kaur (Ravinder Kaur with her) (AS Dhaliwal) for the plaintiff.
Andi Razalijaya bin A Dadi (Deputy Public Prosecutor, Attorney General's Chambers) for the defendants.

Vazeer Alam J:

[1] Enclosure 11 is the defendants' application to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(a) or (b) or (c) or (d) of the Rules of Court 2012.

[2] The brief facts, in so far as they are relevant to this claim, and as can be gleaned from the statement of claim ('SOC'), defence and affidavits, are as follows. The first defendant was at the material time a deputy public prosecutor ('DPP') based in Penang. On 25 June 2009 the first defendant had lodged a police report at the Jalan Patani District Police District Headquarters, Penang, ('the first police report') in respect of malicious uploading of her photographs onto an internet website known as www.kelabseksmelayu.wordpress.com ('the website') by persons unknown. The website had sexually explicit adult content. The first defendant did not identify any person as possible suspect in the first police report.

[3] The second defendant, an officer of the Royal Malaysia Police, as the investigating officer to the first defendant's complaint in the first police report, had, in the course of carrying out investigations, conducted a search of the plaintiff's house at No 7-3-5, Taman Segambut SPPK, 42000 Kuala Lumpur.

[4] In the course of conducting that search at the plaintiff's house, the second defendant had seized several articles including a computer thumb drive and a hard disk. At the time of the seizure the plaintiff was not at home, but his wife was. The seized articles were later sent to the third defendant, at the Unit Siasatan Forensik Komputer, Ibu Pejabat Kontinjen, Pulau Pinang, for examination and analysis. The third defendant is also a serving officer at the Royal Malaysia Police. In the course of analysing the hard disk the third defendant found that the hard disk contained 106 clips of sexually explicit and obscene videos, including those of the plaintiff and his wife. The hard disk also contained the plaintiff's personal documents.

[5] The third defendant then on 14 August 2009 made a police report in respect of his finding the 106 obscene video clips in the hard disk, as he had formed a reasonable believe that the same was an offence under s 5(1) of the Film Censorship Act 2002 ('the second police report').

[6] Section 5(1) of the Film Censorship Act 2002 reads:

(1) No person shall —

(a) have or cause himself to have in his possession, custody, control or ownership; or

(b) circulate, exhibit, distribute, display, manufacture, produce, sell or hire, any film or film-publicity material which is obscene or is otherwise against public decency.

(2) Any person who contravenes subsection (1) commits an offence and shall be liable on conviction to a fine of not less than ten thousand ringgit and not more than fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[7] Based on the third defendant's second police report, the plaintiff was arrested by the second defendant at the Ampang Police Station on 4 November 2009 for an offence under s 5(1) of the Film Censorship Act 2002. And on 5 November 2009 the plaintiff was brought before a magistrate and a remand order was issued wherein the plaintiff was ordered to be held under remand for one day for the purposes of the investigations.

[8] The following day, ie on 6 November 2009, the plaintiff was brought to the Kuala Lumpur Magistrates' Court and based on the complaint by the third defendant's as contained in the website, and upon the evidence collated by the second defendant in the course of investigations, the plaintiff was charged for an offence under s 5(1)(a) of the Film Censorship Act 2002. The charge was instituted upon the instructions of the fourth defendant, a DPP. This fact is pleaded in para 26 of the SOC.

[9] The fifth defendant, another DPP, prosecuted the charge against the plaintiff. The trial was held before the eighth defendant, a first class magistrate. The plaintiff was found guilty of the charge and fined RM15,000 in default six months imprisonment. The plaintiff did not pay the fine and in default was imprisoned. The plaintiff appealed against the conviction and the High Court allowed the appeal, by which time the plaintiff had served his default sentence in prison. The plaintiff has filed this action claiming amongst others damages for false imprisonment, breach of privacy and malicious prosecution.

[10] As against these facts, let me examine the causes of action pleaded in the statement of claim and the relief sought by the plaintiff against the various defendants.

[11] At the outset, let me deal with the pleaded case against the first defendant. The plaintiff claims general damages against the first defendant for invasion of privacy (see para 78 of the statement of claim). The plaintiff states the his and his wife's privacy was breached following the search of his house by the second defendant on two occasions which were done based on the first police report made by the first defendant. Apart from these averments found in paras 11, 12, 72 and 76 of the statement of claim, there are no other material

averments against the first defendant. Though the first defendant is a DPP, the first police report was lodged in her individual capacity as a result of the malicious uploading of her photographs onto an obscene internet website. The plaintiff states in para 72 of the statement of claim that the first defendant had made the first police report maliciously against the plaintiff; however, the plaintiff has failed to provide any particulars thereof. I also find that invasion of privacy is not an actionable tort in Malaysia for reasons provided below. Therefore, on the pleadings as they stand I do not find any reasonable cause of action disclosed against the first defendant.

[12] The plaintiff claims against the second, third and ninth defendants general damages for:

(a) invasion of his and his wife's privacy as well for disturbance caused to the plaintiff's wife at her work place;

(b) special damages for the seizure of the thumb drive belonging to his wife that contained his wife's work related information;

(c) exemplary damages;

(d) aggravated damages; and

(e) vindicatory damages.

[13] The second defendant had in the course of her investigations conducted a search of the plaintiff's house on 13 July 2009 and seized a thumb drive and hard disk. This is pleaded in paras 12–15 of the statement of claim. It is pertinent to note that the plaintiff claims that these items belong to his wife. In proffering the charge against the plaintiff the prosecution obviously thought otherwise. Now, did the second defendant as an Inspector of Police have lawful authority to conduct the search of the plaintiff's house and seize the two items? The answer is yes. The second defendant, as an Inspector of Police, may do so under the relevant provisions of the Criminal Procedure Code. In any event, the plaintiff does not make any complaint in the pleadings about the legality of the search on 13 July 2009. The plaintiff states in para 15 of the statement of claim that the second defendant did not have reasonable grounds to seize the thumb drive and hard disk.

[14] The second defendant then gave the thumb drive and hard disk to the third defendant for his analysis. The claim against the third defendant is found in paras 26, 32, 33, and 34 of the statement of claim. The plaintiff's complaint is that the charge against him was based on the website made by the third defendant, and that the third defendant does not have the qualification or expertise as a computer forensic expert to carry out the analysis on the thumb drive and hard disk. The plaintiff further alleges that the third defendant was the complainant, forensic expert and investigating officer in his case.

[15] The plaintiff further avers in para 24 of the statement of claim that the second defendant once again on 5 November 2009 conducted a search of his house and had thus breached his and his wife's privacy. It is worth noting that the plaintiff was not at his house when the second defendant conducted both searches of the premises. In fact during the second search on 5 November 2009, the plaintiff was held in remand. In the circumstance, the allegation that his privacy was breached by these searches is rather spurious.

[16] In any event, in circumstances such as these, the law does not recognise invasion or breach of privacy rights as an actionable wrong. In *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2001] MLJU 751; [2004] 5 CLJ 285, the High Court after having considered this area of the law in some detail held that:

> Based on the above authorities, I am of the view that it is clear that English Common Law does not recognise privacy rights and it therefore follows that invasion of privacy rights does not give rise to cause of action. As English Common Law is applicable in Malaysia pursuant to s 3 of the Civil Law Act 1956, privacy rights which is not recognised under English Law is accordingly not recognised under Malaysian law. Thus, the respondent does not have the right to institute an action against the appellant for invasion of privacy rights.

That decision was followed by the High Court in *Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor* [2009] MLJU 1331; [2009] 1 LNS 1256 where the court refused to recognise invasion of privacy as an actionable tort.

[17] In the Court of Appeal case of *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal* [2010] 5 MLJ 755; [2010] 7 CLJ 525 (CA), Zaleha Zahari JCA (later FCJ) in upholding the High Court judgment had affirmed the following clear exposition of the law by the learned High Court judge:

> To my mind, it was unethical and morally wrong for the first and second defendants to have published the plaintiff's photograph for the purpose of their commercial promotion without her consent. *It was unwarranted invasion of the plaintiff's privacy. It is unfortunate for the plaintiff, that the law of this country, as it stands presently, does not make an invasion of privacy an actionable wrongdoing* (it is actionable under the law of some other jurisdictions, for example, in the United States). (Emphasis added.)

Now, that is a clear endorsement by the Court of Appeal of a statement of the law, which is, as the law stands, invasion of privacy is not an actionable wrong.

[18] Learned counsel for the plaintiff has alluded to the earlier Court of Appeal case of *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653, where Suriyadi Halim Omar JCA (now FCJ) had, in

allowing the appeal, made the following remark:

> It was pleaded that at about 11.30pm on 21 March 2003 the appellant was arrested at the Kelab De Vegas at Jalan Imbi, Kuala Lumpur in a joint operation by officers of the second and third respondents. The appellant, together with some other persons arrested, were then put into a truck and driven off to Taman Maluri, Cheras. Enroute the appellant had requested from officers of the second and third respondents permission to use the toilet facilities but was disallowed. Instead she was scolded and told to urinate in the truck. As she was in quite a state, she asked her friends to shield her by encircling her with a shawl, in order to ease herself. At that particular moment, the first defendant suddenly opened the door of the truck, rushed in, pulled down the shawl and proceeded to take numerous photos of the appellant in a squatting position urinating. As a result, the appellant was thoroughly humiliated with the whole incident, which was within the view of everyone in the truck.
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> *There was abundance of evidence as regards this invasion of privacy, amongst others, his subsequent prosecution for a charge under s 509 of the Penal Code under arrest case C83-494-2003.* He pleaded guilty and was convicted of it. He was accordingly sentenced to four months jail vide, with the sentence confirmed by the High Court vide a revision. In fact, this issue of the invasion of privacy was never under challenge.
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> *To return to the pleadings, the appellant pleaded that her privacy had been invaded, resulting in her humiliation, trauma and serious mental anguish.* She wanted general, aggravated and exemplary damages in the sum of RM5,000,000, interest and costs from the first defendant and the respondents. *She pleaded that the officers of the second and third respondents at the material time, had negligently failed to protect her well-being, by allowing the first defendant to snap those photographs.* To reiterate, at the end of the trial, the learned judge found for the appellant only as regards the first defendant, but not the rest of the respondents. Neither did the first defendant nor the respondents appeal against that decision. (Emphasis added.)

[19] Learned counsel for the plaintiff submits that this is tacit acknowledgment by the Court of Appeal that invasion of privacy is now recognised as an actionable wrong in Malaysia. I beg to differ. Now, nowhere in that judgment does the Court of Appeal state in clear words that invasion of privacy is an actionable wrong. In fact the Court of Appeal in that judgment had pointed out that the plaintiff's case against the defendants was in negligence ie that the officers of the second and third respondents/defendants at the material time, had negligently failed to protect her well-being, by allowing the first defendant to snap those photographs (the invasion of privacy). Therefore, to my mind, the invasion of the plaintiff's privacy in that case was evidence by which negligence was established against the defendants/respondents. The Court of Appeal in that case did not expressly or impliedly recognise invasion of privacy as an actionable wrong.

[20] Learned counsel for the plaintiff has further relied on the High Court

case of *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835; [2011] 4 CLJ 397 and contends that invasion of privacy is now recognised in Malaysia as a tort. In that case the defendant who was the plaintiff's doctor had whilst performing a surgical procedure for hemorrhoids taken photographs of the plaintiff's private parts, without her consent. The defendant admitted taking the photographs but contended that it was in accordance to accepted medical practice and that he did not disseminate the two photographs but kept them in his medical records to facilitate easy explanation to the patient after the performance of the aforesaid procedure. The learned High Court judge Chew Soo Ho J in allowing the plaintiff's claim, had found that invasion of privacy was a recognised tort. In arriving at that decision the learned judge had relied on the remarks of Suriyadi JCA in *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors*. The relevant part of Chew Soo Ho J's judgment reads:

> The Court of Appeal allowed her appeal and held the respondents to be jointly and severally liable for the wrongful act of their agent as well as vicariously liable. *Although Maslinda Ishak's case is not directly on point,* the fact remains that the High Court in so finding has departed from the old English law that invasion of privacy is not an actionable tort and our *Court of Appeal indirectly, though this issue was not canvassed, seems to endorse such cause of action* when the pleadings were specifically referred to and CA did not overrule invasion of privacy as a cause of action on ground that it is not one in line with the English law. Since such a cause of action has been accepted as a cause of action under our common law, it is thus permissible for a plaintiff to found his/her action on it. Drawing an analogy of this Court of Appeal case, I am inclined to hold the view that since our courts especially the Court of Appeal have accepted such an act to be a cause of action, it is thus actionable. The privacy right of a female in relation to her modesty, decency and dignity in the context of the high moral value existing in our society is her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched. Hence, it is just right that our law should be sensitive to such rights. In the circumstances, plaintiff in the instant case ought to be allowed to maintain such claim. (Emphasis added.)

[21] The learned judge whilst placing reliance on *Maslinda Ishak*'s case, qualifies his decision by stating that *Maslinda Ishak* is not directly on point and that the issue of whether invasion of privacy is a recognised tort was never canvassed in that case.

[22] In *M Mohandas Gandhi & Anor v Ambank (M) Berhad & Anor* [2014] 1 LNS 1025 the Lau Bee Lan J was minded to follow the decision of Chew Soo Ho J in *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835; [2011] 4 CLJ 397 and held that in her judgment:

> ... the law in Malaysia on the issue of invasion of privacy, as it stands presently, has developed in the sense that *there is recognition of a cause of action in invasion of privacy* as held by the Court of Appeal in *Maslinda Ishak* and followed by *Lee Ewe Poh but it is limited to matters of private morality and modesty*. (Emphasis added.)

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However, in the face of a direct and express affirmation by the Court of Appeal in *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal* [2010] 5 MLJ 755; [2010] 7 CLJ 525 (CA) (a case later to *Maslinda Ishak*) that the law does not recognise invasion of privacy as an actionable tort,
B I am not prepared to make a definitive ruling to the contrary. In as much as I may agree that this area of the law is ripe for reform, I am bound by the doctrine of stare decisis to apply the law as it stands, and the law as it stands now is that, in the circumstance of the pleaded facts, no such actionable tort for invasion of
C privacy can arise.

[23] Now, even if I were to accept and follow the decisions of the High Court in *M Mohandas Gandhi & Anor v Ambank (M) Berhad & Anor* [2014] 1 LNS 1025 and *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835; [2011]
D 4 CLJ 397, where the tort of invasion of privacy it is limited to matters of private morality and modesty, I find that such a cause of action is not disclosed on the pleaded facts.

[24] If indeed the second defendant had entered into and searched the
E plaintiff's house and seized his belongings without lawfully authority, then a cause of action in trespass would lie against the second defendant. It is not as if the plaintiff is deprived of an avenue to seek legal redress if such a complaint can be established. However, the plaintiff has chosen not to sue for trespass in this action. The plaintiff has chosen to prosecute his claim based on a cause of
F action that is not recognised in law.

[25] Further in para 79 of the statement of claim the plaintiff claims general damages for disturbing his wife at her work place; and special damages for the
G seizure of his wife's thumb drive that contains his wife's data and office related information. I find that this claim is misconceived in law. If the plaintiff's wife is aggrieved by any of the actions of these defendants then she ought to bring the action herself and not the plaintiff. The plaintiff has no standing in law to bring the action in his name on behalf of his wife.

H

[26] Therefore, based on the pleadings, I find that there is no reasonable cause of action disclosed against the second and third defendants and as such no vicarious liability can attach to the ninth defendant, the government of Malaysia.

I

[27] The plaintiff in para 80 of the statement of claim claims various heads of damages against the second, third, fourth, fifth, sixth, seventh, and ninth defendants for malicious prosecution. The essential elements of the tort of malicious prosecution that the plaintiff needs to plead and prove are:

(a) the defendants set the criminal law in motion against the plaintiff;

(b) that the defendants did not have any reasonable or probable cause for setting the law in motion against the plaintiff;

(c) that the defendants were actuated by malice in the sense that they had a motive other than to carry the law into effect;

(d) that the proceedings terminated in the plaintiff's favour; and

(e) that the plaintiff had suffered damages.

(See *Rawther v Abdul Kareem* [1966] 2 MLJ 201 (FC)).

[28] Therefore, in cases of malicious prosecution against the prosecutor, a plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution and malice in the form of deliberate and improper use of office. It must be gainsaid that such cases would not be dealing with second guessing a prosecutor's judgment or conduct of the trial but rather with the deliberate and malicious use of his office for ends that are improper and inconsistent with the statutory prosecutorial function.

[29] This court has in *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors* [2014] 11 MLJ 481, held that the public prosecutor and his deputies may be sued for malicious prosecution, where the prosecution had been brought without reasonable and probable cause and where the prosecution was actuated by malice in that the prosecutorial power was deliberately used for ends that are improper and inconsistent with the statutory or constitutional prosecutorial function. However, as against this right afforded to an individual, is the principle that the civil tort of malicious prosecution is not an after-the-fact judicial review of the public prosecutor's exercise of prosecutorial discretion, nor is it an exercise to find fault in the manner in which the prosecution was conducted. Under the strict standard established by the Supreme Court of Canada in *Nelles v Ontario* [1989] 2 SCR 170, malicious prosecution against the prosecutor will only be made out where there is proof that the prosecution was fuelled by 'an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve'. That principle would very much apply in our jurisdiction as well.

[30] To allow any and every acquitted person to institute civil proceedings against the prosecutor or the investigating authority, on grounds of the prosecution having failed to prove its case against the accused would be contrary to public interest and policy. Therefore, the mechanisms available within the system of civil procedure, including summarily striking out meritless claims under O 18 r 19(1) of the Rules of Court 2012, must be judiciously used to weed out unmeritorious claims and ensure that the public

prosecutor and his deputies will not be hindered in the proper execution of their important constitutional and public duties to uphold the rule of law by enforcing criminal law, as well as maintaining law and order for the greater good of society.

[31] Thus, in *Proulx v Quebec (Attorney General)* 2001 SCC 66; [2001] 3 SCR 9, Canadian Supreme Court held that:

> Under our criminal justice system, prosecutors are vested with extensive discretion and decision-making authority to carry out their functions. Given the importance of this role to the administration of justice, courts should be very slow indeed to second-guess a prosecutor's judgment calls when assessing Crown liability for prosecutorial misconduct. *Nelles v Ontario* [1989] 2 SCR 170*, affirmed unequivocally the public interest in setting the threshold for such liability very high, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is engaged in only the most exceptional circumstances*. Against these vital considerations is the principle that the Ministry of the Attorney General and its prosecutors are not above the law and must be held accountable. Individuals caught up in the justice system must be protected from abuses of power. In part, this accountability is achieved through the availability of a civil action for malicious prosecution. (Emphasis added.)

[32] Now, in light of these legal principles, let me consider the plaintiff's pleaded case for malicious prosecution against the second, third, fourth, fifth, sixth, seventh, and ninth defendants. The second defendant is the investigating officer who investigated the first police report lodged by the first defendant. The third defendant carried out the analysis of the contents of the thumb drive and hard disk seized by the second defendant from the plaintiff's house. The third defendant lodged the website upon finding obscene videos clips stored in the hard disk. The second defendant's investigations, including the search and seizure of the hard disk, and the third defendant's analysis on hard disk became the foundation for the charge under s 5(1) of the Film Censorship Act 2002.

[33] The plaintiff's complaint against the fourth defendant, a DPP, is contained mainly in paras 24, 25 and 26 of the statement of claim. The gist of the complaint is that the charge against the plaintiff was laid following the instructions and consent to charge issued by the fourth defendant. The plaintiff further alleges that the charge was laid without cogent evidence and that this shows malice on the part of the fourth defendant in issuing the consent to prosecute.

[34] The fifth defendant is the DPP who carried out the prosecution and conducted the trial for the prosecution. The claim against the fifth defendant is contained mainly in paras 28–40 and 65 of the statement of claim and they relate to the manner in which the fifth defendant had conducted the trial,

including the calling of witnesses and tendering of evidence. The plaintiff alleges that the prosecution was not carried out in accordance to law and procedure and that it was done maliciously.

[35] The plaintiff's complaint against the sixth defendant is as follows. In the course of the trial, the plaintiff applied to recuse the eighth defendant from presiding at the trial. And in opposing that application the sixth defendant, a legal assistant ('pembantu undang-undang') at the Attorney General's Chambers, had affirmed the affidavits on behalf of the prosecution.

[36] The plaintiff alleges that the sixth defendant ought not to have affirmed the affidavits and that a DPP should have affirmed them. Other than this, there are no other material complaints against the sixth defendant. Nor do the pleadings disclose any other role played by the sixth defendant in relation to the plaintiff's arrest, prosecution and detention.

[37] Now, there is no requirement in law that such affidavits be affirmed by the DPP having conduct of the matter. There is no legal bar to the sixth defendant, as a deponent, in affirming the affidavits if she had knowledge or believe as to the facts deposed. The plaintiff ought to have taken up any challenge to admissibility or relevancy of the evidence adduced in these affidavits affirmed by the sixth defendant at the trial and/or during arguments in respect of the recusal application. The mere affirming of these affidavits, without anything more, does not give rise to any reasonable cause of action against the sixth defendant in malicious prosecution.

[38] The plaintiff's complaint against the seventh defendant, the public prosecutor is found mainly in para 66 of the statement of claim. The plaintiff states that the seventh defendant as the public prosecutor, and who supervises the fourth, fifth, and sixth defendants, who are his deputies, had failed to take any action on the matter even though he had the powers to initiate, conduct or discontinue any prosecution. The plaintiff has however failed to give any particulars for this allegation. Apart from this bare averment there is no other material complaint against the seventh defendant. The plaintiff's complaint against the seventh defendant is devoid of particulars and is to say the least, embarrassing. This bare averment does not give rise to any reasonable cause of action in malicious prosecution against the seventh defendant.

[39] I find that on the pleadings, the facts disclose that there is reasonable and probable cause for the charge under s 5(1)(a) of the Film Censorship Act 2002 to be laid against the plaintiff. The charge arose from a police complaint lodged by the third defendant, following the third defendant's examination of the contents of the hard disk that was found in the plaintiff's house and in which there were personal documents of the plaintiff. Therefore, there was

some degree of nexus between the plaintiff and the contents of the hard disk. The fourth defendant, based on the evidence before him, gave his written consent as required under s 43 of the Film Censorship Act 2002, and instructed that the plaintiff be charged under s 5(1) of the Film Censorship Act 2002. The fifth defendant then proceeded to conduct the trial. In other words the fourth and fifth defendants believed that there was probable and reasonable cause to initiate and continue the prosecution against the plaintiff.

[40] The classic definition of the term reasonable and probable cause was expounded by Hawkins J in the case of *Hicks v Faulkner* (1878) 8 QBD 167 at pp 171–172:

> Now I should define reasonable and probable cause to be, an *honest belief* in the guilt of the accused based upon a full conviction, founded upon *reasonable grounds*, of the existence of a state of circumstances, which, assuming them to be true, would *reasonably lead any ordinary prudent and cautious man*, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an *honest belief* of the accuser in the guilt of the accused; secondly, such belief must be based on an *honest conviction* of the existence of the circumstances which led the accuser to that conclusion, thirdly, such secondly mentioned belief must be based upon *reasonable grounds*; by this I mean such grounds as would lead any *fairly cautious man in the Defendant's situation* so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to *reasonable ground for belief in the guilt of the accused*.

[41] This dicta of Hawkins J was adopted and applied by Lord Atkin in *Herniman v Smith* [1938] AC 305 in the following terms:

> An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

[42] The House of Lords in *Glinski v McIver* [1962] AC 726 reviewed the authorities on malicious prosecution, including the test laid down by Hawkins J in *Hicks v Faulkner* on the issue of reasonable and probable cause, and variously formulated the test as follows:

Lord Denning expressed the view that at p 758:

> [I]n truth he (the prosecutor) has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield, that there is a probable cause 'to bring the [accused] 'to a fair and impartial trial': see *Johnstone v Sutton* 1 Term Rep 493, 547. After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him.

Lord Ratcliff also stated that the test was whether the prosecutor believed that there was a case fit for trial and said, at pp 753–754:

> ... I think, that the ultimate question is not so much whether there is reasonable or probable cause in fact as whether the prosecutor, in launching his charge, was motivated by what presented itself to him as a reasonable and probable cause. Hence, if he did not believe that there was one, he must have been in the wrong.

Lord Devlin expressed similar view, at p 766:

> This makes it necessary to consider just what is meant by reasonable and probable cause. It means that there must be cause (that is, sufficient grounds: I shall hereafter in my speech not always repeat the adjectives 'reasonable' and 'probable') for thinking that the plaintiff was probably guilty of the crime imputed: *Hicks v Faulkner* (1878) 8 QBD 167, 173. This does not mean that the prosecutor has to believe in the probability of convicting: *Dawson v Vandasseau* (1863) 11 WR 516, 518. *The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried.*

[43] In *Coudrat v Commissioners of Her Majesty's Revenue and Customs* [2005] EWCA Civ 616; [2005] 1 WLR 45, the Court of Appeal referred to *Glinski v McIver* and derived from it a composite test, and that test is, whether the prosecutor believed that there was a case fit to be tried; and whether there was, objectively, evidence sufficient to justify such a belief. That succinctly encapsulates the law as regards the issue of reasonable and probable cause.

[44] The principle that can be extracted from these cases is that, the extent of culpability believed by the defendant, before he initiates the charge, need not be to a degree where the plaintiff would be convicted, but rather whether the defendant believed that there was a reasonable case fit enough for the charge to be brought. The plaintiff's pleadings are devoid of any facts indicating that these defendants did not have any grounds to form an honest belief that there was reasonable and probable cause to lay the charge against the plaintiff. Nor are there any pleaded facts with sufficient particulars to show the lack of the same. In fact, the pleaded facts, show that the defendants had reasonable and probable cause to initiate and continue the prosecution against the plaintiff.

[45] Now, it is trite that if there is reasonable and probable cause disclosed, then the plaintiff's claim for malicious prosecution cannot be sustained, even if improper motive is shown. For it is well settled that once there is reasonable and probable cause, the motive for the prosecution is immaterial, even if it is malicious. In such circumstance the lack of bona fides is not an issue, as Denning LJ stated in *Tempest v Snowden* [1952] 1 KB 130 at p 140:

A Even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution.

Thus, a proper use of the court's machinery will not be tortious even if the prosecutor had an ulterior personal motive for bring that action: see *King v Henderson* [1898] AC 720; *In re Majory; Ex p The Debtor v FA Dumont Ltd* [1955] Ch 600; *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 and *Broxton v McClelland* [1995] EMLR 485.

C **[46]** Therefore, as pointed out by Tindal CJ in *Willans v Taylor* (1829) 6 Bing 183 at 186; (1829) 130 ER 1250, in order to succeed on a claim for malicious prosecution:

There must be a concurrence of malice in the defendant and want of probable cause.

D **[47]** The pleadings and the facts disclosed in the affidavits do not show this concurrence of malice and want of probable cause. As such, this claim against the second, third, fourth, fifth, sixth, seventh for malicious prosecution and vicariously against the ninth defendant is frivolous and is an abuse of process. E Therefore, the claim against the second, third, fourth, fifth, sixth, seventh and ninth defendants for malicious prosecution is obviously unsustainable and is bound to fail.

[48] I will now move to the plaintiff's claim against the eighth defendant, the F first class magistrate who presided at the trial of the charge. The plaintiff claims in para 81 of the statement of claim various heads of damages for:

(a) absence of jurisdiction (whatever that may mean);

(b) false imprisonment arising from the sentence for contempt of court G meted out to the plaintiff on 17 August 2010; and

(c) false imprisonment.

[49] At the outset, let me take up the complaint of lack of jurisdiction raised H against eighth defendant in trying the plaintiff for a charge under s 5(1)(a) of the Film Censorship Act 2002. The plaintiff's pleadings are devoid of any particulars giving rise to his complaint of lack of jurisdiction on the part of the eighth defendant to try the plaintiff for a charge under s 5(1)(a) of the Film Censorship Act 2002.

I **[50]** In any event, s 44 of the Film Censorship Act 2002, provides that:

Notwithstanding anything contained in any written law to the contrary, a court of a First Class Magistrate shall have the jurisdiction to try any offence under this Act and to award the full punishment for any such offence.

The eighth defendant is a first class magistrate. Therefore, pursuant to s 44 of the Film Censorship Act 2002, the eighth defendant was fully seized with jurisdiction to try the plaintiff for a charge under s 5(1) of the Film Censorship Act 2002.

[51] The plaintiff further alleges that the prosecution against him was initiated without the written consent of the public prosecutor, as is required under s 43 of the Film Censorship Act 2002. According to the plaintiff, this alleged failure shows the malicious intent of the fifth defendant in prosecuting the plaintiff and the eighth defendant in trying the case. The defendants however state that the written consent of the DPP was in fact procured and produced at trial and was marked as exh P1. The same has been produced in the affidavit of Andi Razalijaya bin A Dadi dated 24 September 2014 as exh 'ARBAD1'. The consent reads as follows:

> Pada menurut peruntukan-peruntukan Seksyen 43 Akta Penapisan Filem 2002 dan Seksyen 376(3) Kanun Tatacara Jenayah Semakan 1999 (Akta 593) maka saya MAZELAN BIN JAMALUDIN Timbalan Pendakwa Raya dengan ini mengizinkan pendakwaan Mohamad Izaham Bin Mohamed Yatim, KPT: 720713-07-5519 atas kesalahan dibawah Seksyen 5(1)(a) Akta penapisan Filem 2002 (Akta 620) dan yang boleh dihukum di bawah Seksyen 5(2) Akta tersebut yang dikatakan telah dilakukan pada 13/07/09 @ 1800 hrs di rumah 7-3-5, Jalan 2/38B, Taman Segambut, Kuala Lumpur, dalam daerah Sentul, di dalam Wilayah Persekutuan Kuala Lumpur.

[52] Now, s 376(3) of the Criminal Procedure Code reads:

> The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public Prosecutors.

Therefore, pursuant to s 376(3) of the Criminal Procedure Code, the issuance of the written consent of the under hand of the fourth defendant, a DPP, is proper and valid in law. Thus, I find that there is ample evidence of compliance with the requirement of s 43 of the Film Censorship Act 2002.

[53] In any event, it is trite that where the public prosecutor or his subordinates prosecute in person, consent is implicit. See *Public Prosecutor v Oie Hee Koi & Associated Appeals* [1968] 1 MLJ 148 at p 154 (PC); and *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155 (HC) where the court in reference to the Privy Council's dicta in *Oie Hee Koi* held as follows:

Their Lordships the Privy Council at p 154 in the case of *Ooi Hee Koi* said —

> ... It was further argued that under section 80 of the Act the *consent* of the Public Prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the Public Prosecutor was himself the prosecutor and his *consent* was implicit in his action. The provision in section 80 requiring *consent* is applicable where prosecution takes place, eg before a Sessions Court and the Public Prosecutor is not the actual prosecutor.
>
> It is to be noted that in the above case the prosecution was conducted before the High Court by a Deputy Public Prosecutor who under the Criminal Procedure Code is vested with all the powers of the Public Prosecutor. On the authority of this case, *it is clear that where the prosecution is conducted by a Deputy Public Prosecutor the consent of the Public Prosecutor is implicit in his action and no written consent of the Public Prosecutor is required*. (Emphasis added.)

[54] I have no hesitation in applying the reasoning adopted by the High Court in *Mohamed Halipah*'s case to the instant case and hold that there has been full compliance of the requirements of s 43 of the Film Censorship 2002.

[55] In the instant case, the plaintiff in his statement of claim states that a DPP, namely the fifth defendant, prosecuted the charge against the plaintiff. Thus, the personal presence of a DDP at the trial, when read together with the provisions of s 376(3) of the Criminal Procedure Code, would by itself tantamount to the public prosecutor's consent to prosecute. Therefore, I find that there is no substance to the plaintiff's claim that the prosecution is a nullity for lack of the public prosecutor's written consent. As such, the allegation of lack of jurisdiction and malice in this regard raised by the plaintiff is wholly baseless and is misplaced.

[56] The plaintiff makes various allegations of bias on the part of the eighth defendant, the presiding magistrate, in the conduct of the trial. In the course of the trial, the plaintiff applied to recuse the eighth defendant from presiding at the trial. The prosecution opposed that application. The eighth defendant dismissed the application for recusal and the plaintiff's appeal against that decision was dismissed by the High Court. The learned High Court judge in delivering judgment on that appeal had ordered that the plaintiff's trial to continue before the eighth defendant. The pleadings and the affidavit evidence do not disclose any facts showing the eighth defendant acting in bad faith in his conduct of the trial. There were several interlocutory appeals filed by the plaintiff complaining about the eighth defendant's alleged bias and conduct of the trial, which were all dismissed by the High Court.

[57] I will now consider the plaintiff's claim against the eighth defendant in light of the statutory judicial immunity provided under s 14 of the Courts of Judicature Act 1965, that reads:

> No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do so or order the act complained of.

Vincent Ng J had considered s 14 of the Courts of Judicature Act 1965 and the issue of judicial immunity in great detail in the case of *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 and held as follows:

> From all the welter of case authorities, it is beyond question, and I would hold that s 14 of the CJA and common law afford complete immunity and protection to a judge from all civil liabilities for all judicial acts in cases registered or presided over or assigned to be dealt with by him. And, this immunity is extant even if the judge had acted 'under some gross error, or ignorance, or (his act) was actuated by envy, hatred and malice, and all uncharitableness' or he is 'shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all' (see Sirros, Harvey, Nakhla and Taylor). I am completely ad idem with Lord Buckley LJ that even if the judge is 'shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all' the remedy is his removal from office rather than to sue him in a private action which would not be in the public interest as judges should be able to do their work in complete independence and free from fear in having to perpetually ask the question: 'If we do this shall we be liable in damages?'

That proposition of the law was affirmed by the Court of Appeal as reported in *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11 where Low Hop Bing JCA speaking for the court held:

> The facts and circumstances available in the court below and now in the instant appeal undoubtedly attract the application of judicial immunity under s 14(1). The plaintiffs' purported cause of action is really an exercise in futility under O 18 r 19(1)(a), there being no reasonable cause of action against the first defendant, and so no vicarious liability can be attributed to the second defendant.

[58] From these pronouncements, it is clear that judicial immunity would be available when the judge or a judicial officer, had acted judicially in good faith believing himself to have jurisdiction to carry out the act or make any order. On the facts pleaded and evidence disclosed in the affidavits, I find that the eighth defendant was acting judicially in the discharge of his judicial duty in respect of the matters complained by the plaintiff. The eighth defendant was fully clothed with jurisdiction to try a charge under s 5(1) of the Film Censorship Act 2002. In the circumstance, s 14 of the Courts of Judicature Act 1965 would bar this action.

[59] Wherefore, in applying the principles enunciated by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, I find that the plaintiff's entire claim is not only frivolous, and vexatious but is an abuse of process and is obviously unsustainable.

[60] Thus, I allowed the application contained in encl 11 and ordered that the writ and statement of claim be struck out with cost of RM15,000.

Plaintiff's claim struck out with costs of RM15,000.

Reported by Kohila Nesan